Supreme Court, U.S.
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No. 02-60

In The
Supreme Court of the United States

KARL L. DAHLSTROM,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

KARL L. DAHLSTROM
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Petitioner Pro Se

8 pg

Exhibit "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KARL L. DAHLSTROM, Petitioner, v. UNITED STATES of AMERICA, Respondent.	§ § § § § §	CIVIL ACTION NO. H-00-3108 (Criminal No. H-96-157-01)

MEMORANDUM AND ORDER

(Entered May 15, 2001)

Pending before the court is petitioner, Karl L. Dahlstrom's, Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Docket Entry No. 1, cross-filed under Cr. No. H-96-157 at Docket Entry No. 308). Also pending under Cr. No. H-96-157 is Dahlstrom's Third Supplemental Emergency Motion to Dismiss under Federal Rule of Criminal Procedure 12(b)(2) (Docket Entry No. 307). These motions lack merit and will be denied.

On August 27, 1997, a jury convicted Dahlstrom of: (1) fraud in connection with the purchase and sale of securities (counts 2 and 3), (2) sale of unregistered securities (count 4), (3) acting as an unregistered broker-dealer (count 5), and (4) mail fraud (counts 6, 9-14, and 16).

Dahlstrom appealed his conviction. The Fifth Circuit affirmed his conviction and sentence in a published opinion. *See United States v. Karl Dahlstrom,* 180 F.3d 677 (5th Cir. 1999). The United States Supreme Court denied

Dahlstrom's petition for writ of certiorari on March 27, 2000. *See Dahlstrom v. United States,* 120 S.Ct. 1530 (March 27, 2000).

Dahlstrom filed his petition under 28 U.S.C. § 2255 in this court on September 4, 2000. *See* Petition under 28 U.S.C. to Vacate, Set Aside, or Correct Sentence (Docket Entry No. 1). As grounds for relief, Dahlstrom alleges that:

(1) the prosecutor and court actually and constructively amended the defective indictment concerning essential elements of the offense to charge different offenses at trial;

(2) his sentence violated *Apprendi* because elements that were not charged in the indictment or presented to the jury were used to enhance his sentence; and

(3) the court erred in allowing a "deliberate ignorance" instruction to the jury because "it instructed the jurors of incorrect principles of law applicable to the factual issues confronting them." Dahlstrom also alleges that the "deliberate ignorance" instruction that was given had improper wording.

See Petition at p. 5. The court will address each ground in turn.

A. Dahlstrom's Defective Indictment Allegation

Dahlstrom alleges that the indictment was defective as to counts 2 through 5 because those counts: (a) omitted essential elements of the offense, (b) did not charge criminal offenses but were based on civil statutes, and (c) omitted a *mens rea* allegations. *See* Petition at p. 5 (Docket Entry No. 1). Dahlstrom alleges that because the mail

fraud allegations in counts 6, 9-14, and 16 were predicated on counts 2-5 they are also defective because no criminal fraud is alleged on which to base the mail fraud charges. *See id.* This claim presents no basis for relief for a number of reasons.

First, Dahlstrom has procedurally defaulted these claims by failing to raise them on direct appeal. All claims raised on a collateral attack must first be exhausted through the appeals process. *See Bousley v. United States,* 118 S.Ct. 1604, 1611 (1998) (citations omitted). In order to overcome his default, Dahlstrom must prove either cause and actual prejudice or that he is actually innocent. *See id.* Dahlstrom has made no effort to satisfy either standard required to excuse procedural default. Accordingly, Dahlstrom is not entitled to relief on this claim.

Furthermore, even if this claim had been exhausted these claims are entirely without merit. Counts 2-5 reallege and incorporate the voluminous factual allegations of the indictment set forth with count one. *See* Indictment at pp. 11, 12, 13, 14. These factual allegations lay out in detail that the defendants knowingly and willfully engaged in violations of the Securities Acts and engaged in fraud using the mails. The elements of the substantive crimes underlying the conspiracy count are also accurately recited in count 1 and realleged and incorporated in the ensuing counts. *See* Indictment at pp. 3-4. Moreover, each count tracks the relevant statute and sets out the elements required for each crime. Although Dahlstrom argues that no *mens rea* was alleged, each count contains the required *mens rea* for a *criminal* violation of the Securities Acts. For example, count 2 states that the defendants "knowingly and willfully" engaged in the conduct set forth in that count. *See* Indictment at ¶ 22.

Willful violation of the Securities Acts is a crime. *See* 15 U.S.C. § 77x (West 1997). Contrary to Dahlstrom's argument, there are no exemptions or exceptions to securities fraud. *See United States v. Tallant,* 547 F.2d 1291, 1297 n.15 (5th Cir.), *cert. denied,* 98 S.Ct. 262 (1977). The exceptions and exemptions of the Securities Code to registration of securities or persons are an affirmative defense, not elements of the crime. *See Securities and Exchange Commission v. Continental Tobacco Co.,* 463 F.2d 137, 155-56 (5th Cir. 1972) (citations omitted); *United States v. Anzelmo,* 319 F.Supp. 1100, 1121-22 (E.D. La. 1970) (citations omitted). Accordingly, the exceptions and exemptions argued by Dahlstrom were not necessary to the indictment.

The mail fraud counts were also adequately alleged. As discussed above, Dahlstrom's argument that the securities fraud counts forming the basis of the mail fraud counts were inadequate is meritless. Furthermore, the mail fraud counts are sufficient in themselves. An indictment that tracks the statutory language of 18 U.S.C. § 1341 is sufficient to charge mail fraud. *See Kreuter v. United States,* 218 F.2d 532 (5th Cir.), *cert. denied,* 75 S.Ct. 777 (1955). The elements of mail fraud are (a) a scheme to defraud, and (b) a mailing for the purpose of executing the scheme. *See United States v. Tallant,* 547 F.2d at 1298. These elements are alleged in the indictment. *See* Indictment, p. 17 (Docket Entry No. 1 in Cr. No. H-96-157).

B. Dahlstrom's *Apprendi* Allegations

Dahlstrom alleges that his sentence violated the holding of *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000),

because elements were used to enhance his sentence that were not presented to the jury and decided beyond a reasonable doubt. As explained above, no elements were added to those in Dahlstrom's indictment because all necessary elements were contained in the indictment. The essence of Dahlstrom's claim, however, is that the wrong amount was used to calculate the loss attributable to his conduct. Whether Dahlstrom's sentence was properly calculated under the Sentencing Guidelines is not a constitutional issue cognizable on § 2255 review. *See, e.g., United States v. Segler,* 37 F.3d 1131, 1133-34 (5th Cir. 1994). The Fifth Circuit has held that *Apprendi* does not apply to facts used to enhance a sentence under the Sentencing Guidelines within the statutory range. *See United States v. Keith,* 230 F.3d 784, 786 (5th Cir.), *cert. denied,* 120 S.Ct. 1999 (2000). Because the statutory maximum sentence for violation of the Securities Act of 1934 under 15 U.S.C. § 78ff(a) is up to ten years' imprisonment, Dahlstrom's sentence of 78 months' imprisonment is well below the statutory maximum. Dahlstrom's sentence of 60 months for violation of the Securities Act of 1933 under 15 U.S.C. § 77x likewise does not exceed the statutory maximum of 5 years' imprisonment. Because the loss attributable to Dahlstrom's conduct that was used to calculate his sentence did not result in a sentence greater than the statutory maximum for each count, Dahlstrom is not entitled to relief on this basis.

C. Dahlstrom's Allegation that an Erroneous Instruction was Given

Dahlstrom alleges that the court committed plain error by instructing the jury on deliberate ignorance. Because Dahlstrom failed to raise this issue on appeal, he

has procedurally defaulted this claim. *See Bousley,* 118 S.Ct. at 1611. Dahlstrom has made no effort to show cause and prejudice, and his default will not be excused. Furthermore, Dahlstrom's claim has no merit. First, the facts of Dahlstrom's case indicate that the instruction was warranted. Section 77x does not require proof that defendant knew his actions were illegal; willfulness can be proven by evidence of deliberate ignorance. *See United States v. Schlei,* 122 F.3d 944, 973 (11th Cir. 1997), *cert. denied,* 118 S.Ct. 1523 (1998). Furthermore, even if giving the instruction were error, erroneously providing an instruction on deliberate ignorance is harmless error where evidence of actual knowledge is presented. *See United States v. Davis,* 226 F.3d 346, 358 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 1161 (2001). Evidence of actual knowledge was repeatedly presented at trial. Accordingly, Dahlstrom is not entitled to relief on this basis.

IV. Conclusions and Order

Dahlstrom has procedurally defaulted his claims challenging the sufficiency of his indictment. Furthermore, the indictment charging Dahlstrom was not constitutionally defective. Because Dahlstrom's sentence did not exceed the statutory maximum, his argument that his sentence was incorrectly calculated based on an erroneous amount of loss attributable to the fraud he perpetrated is constitutionally irrelevant. Dahlstrom has procedurally defaulted his claim that an improper instruction was given at trial. Furthermore, the deliberate ignorance instruction given at his trial was proper and any error in giving the instruction was harmless. Accordingly, Dahlstrom's Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Docket Entry No. 1) is **DENIED.**

Because the court finds no meritorious basis for modification of Dahlstrom's sentence or any other relief, all other relief requested is **DENIED.**

Dahlstrom's numerous motions under Fed. R. Crim. P. 12(b)(2) (Docket Entry Nos. 301, 304, and 307 in Cr. No. H-96-157) are frivolous and are **DENIED**. Dahlstrom's Motion for Reconsideration of Motion for Modification of Sentence (Docket Entry No. 300 in Cr. No. H-96-157) and First supplemental Motion for Reconsideration (Docket Entry No. 305 in Cr. No. H-96-157) are **DENIED**. Dahlstrom's Motion to Hold Deadline for Responding to Post-Conviction Pleadings in Abeyance (Docket Entry No. 318 in Cr. No. H-96-157) is **DENIED as moot**. Dahlstrom is warned that if he files another frivolous motion of any kind he may be sanctioned.

SIGNED at Houston, Texas, on this the 11th day of May, 2001.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE